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# In the Supreme Court of the United States

OCTOBER TERM, 1994

MARK S. ZABKAR, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## PETITION FOR WRIT OF CERTIORARI

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OCTOBER 1994

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## QUESTIONS PRESENTED

Whether the military judge erred by failing to inquire into whether a factual basis existed for the stipulation of fact in violation of *United States v. Bertelson,* 3 M.J. 314 (C.M.A. 1977) as well as misadvising the appellant as to the effect of his confessional stipulation in violation of *United States v. Watruba,* 35 M.J. 488 (C.M.A. 1992).

Whether the appellant was the victim of selective prosecution thereby rendering his court-martial a nullity.

Whether the appellant was denied effective assistance of counsel.

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# In the Supreme Court of the United States

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No.

MARK S. ZABKAR, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

---

## PETITION FOR WRIT OF CERTIORARI

---

The petitioner, Mark S. Zabkar, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Military Appeals entered in his case on 20 July 1994.

### OPINIONS BELOW

The order of the United States Court of Military Appeals affirming the decision of the Air Force Court of Military Review is reported at ____ MJ ____ (C.M.A. 1994) (Appendix A). The unpublished opinion of the United States Air Force Court of Military Review is attached. (Appendix B).

### JURISDICTION

The final order of the United States Court of Military Appeals was entered on July 20th, 1994. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

## STATEMENT OF THE CASE

On 19 January 1991, after a date with Amn Malloy, the appellant and Amn Malloy returned to the appellant's quarters. Returning to his room after leaving it for a brief period, the appellant discovered that Amn Malloy had removed her clothing and was lying on his bed. Amn Malloy then went into the bathroom, obtained one of the appellant's disposable razors and requested that the appellant cut her shoulders, suck the blood out of the cuts, and engage in anal intercourse with her. When the appellant suggested they should go to the hospital, Amn Malloy responded by throwing a drink on him. Emerging from the bathroom with a towel to clean up the spilled drink, the appellant discovered that Amn Malloy had slit her wrists. The appellant then told her he was taking her to the hospital, to which Amn Malloy responded with vulgarities. She then took a cigarette out of her purse, lit it, and told the appellant she wanted to kill herself when he told her to get out of his apartment. Amn Malloy then threatened the appellant by telling him if he called the police, she would scream "rape" and then "who would they believe, with (her) back and wrists all cut up." Affidavit of appellant. She then forced the appellant to smoke a cigarette she had taken out of her purse, to prove she could trust him and so she would not do herself in. After they finished the cigarette, Amn Malloy returned to her dorm room. Affidavit. The following day the appellant submitted to a urinalysis test which ultimately tested positive for the marijuana metabolite. *See* Narrative Message, Allied Papers.

As a result of this positive urinalysis, the appellant was scheduled to be discharged pursuant to AFR 39-10. *See* AF Form 286A, Allied Papers; Ltr. dated 21 March 1991 to Congressman Frank Horton, Allied Papers. However,

the appellant's First Sergeant, SMSgt Capocia, was deployed to the Middle East, and Major Ronald J. Juhl assumed command of the appellant's squadron. Following the 22 February 1991 congressional inquiry from Congressman Horton, Ltr to the Vice Commander at Griffiss AFB, Allied Papers, Major Juhl canceled the appellant's planned administrative separation, and preferred the Charge and Specification at bar against the appellant on 27 March 1991. R. 6a. The Charges were referred the same day. R. 6b. This action against the appellant was done despite the fact that first term airmen under similar circumstances would have received nonjudicial punishment and a General Discharge. Clemency Request. The appellant's Request for Discharge in Lieu of Court-Martial was disapproved by the 416th BW/CC, Col Michael F. Loughran on 23 April 1991. Ltr from Col Loughran dated 23 April 91, Allied Papers.

At trial, in a judge alone forum, the appellant pleaded not guilty to the Charge and its Specification, but stipulated to both elements of the offense of the wrongful use of marijuana. The appellant's counsel made no motions and did not bring any of the above facts surrounding the appellant's use of marijuana to the attention of the military judge, notwithstanding their obvious exculpatory value. During the subsequent inquiry required by *United States v. Bertelson,* the military judge failed to determine whether in fact there was a factual basis for the appellant's plea of guilty. Notwithstanding his plea, the appellant was found guilty of the wrongful use of marijuana in violation of Article 112a, U.C.M.J.

The appellant was sentenced to a bad conduct discharge, confinement for 15 days, and reduction to the lowest enlisted grade (E-1). The convening authority approved the sentence as adjudged on 17 June 1991.

On 1 March 1993, the Air Force Court of Military Review affirmed the findings and sentence as approved by the convening authority. (Appendix B). The Air Force Court of Military Review determined, *inter alia,* that the appellant failed to present a *prima facie* case that he was the victim of selective prosecution. After obtaining affidavits from appellant's trial defense counsel, the Court determined that said counsel were not ineffective at trial. Lastly, the court held that the *Bertelson* inquiry performed by the military judge was adequate.

On 16 March 1993, appellant submitted a Petition for Grant of Review with the United States Court of Military Appeals asserting three issues of error. On 25 June 1993, that Court granted appellant's Petition with regard to issue I, the *Bertelson* issue and ordered the appellee to file a response brief to appellant's supplement to petition for grant of review. After reviewing the appellee's response brief, the Court of Military Appeals summarily affirmed the lower court's decision in its 20 July 1994 order. (Appendix A).

**REASONS FOR GRANTING THE WRIT**

I. THE MILITARY JUDGE ERRED BY FAILING TO INQUIRE WHETHER A FACTUAL BASIS EXISTED FOR THE STIPULATION OF FACT IN VIOLATION OF *UNITED STATES v. BERTELSON,* 3 M.J. 314 (C.M.A. 1977) AS WELL AS MISADVISING THE APPELLANT AS TO THE EFFECT OF HIS CONFESSIONAL STIPULATION IN VIOLATION OF *UNITED STATES v. WATRUBA,* 35 M.J. 488 (C.M.A. 1992).

Notwithstanding established military precedent and the constraints of Article 45, U.C.M.J., the military judge

failed to ascertain from the appellant on the record that a factual basis existed for the stipulation of fact entered into in this case, namely, Prosecution Exhibit 1. Prosecution Exhibit 1 formed the entire basis of the Government's case against the appellant. During findings, the military judge merely read Prosecution Exhibit 1 to the appellant, asked him if he understood the "facts" and if they were true to the best of his knowledge, and whether he stipulated to the facts contained therein. R. 9. A reading of Prosecution Exhibit 1, however, reveals that the alleged "facts" were a mere recapitulation of the "legalese" found on the charge sheet, *e.g.*, ". . . the accused, Sgt. Zabkar, knowingly and without legal justification, wrongfully used marijuana, a controlled substance . . ." R. 9. Moreover, the military judge misadvised the appellant as to the effect of the confessional stipulation he was entering. In particular, the military judge advised the appellant that:

> MJ: By entering into this stipulation to these facts you give up certain constitutional rights. These rights are first, your right against self-incrimination. That is, you've given up your right to say nothing at all. Second, you give up the right to a trial of facts by court-martial. No trial of the facts is required because you are admitting that the facts set out in the Specification are true. And third, you give up the right to be confronted by the witnesses against you as to these facts. Ordinarily, there would be no witnesses called to testify or other evidence presented because your Stipulation admits the facts alleged in the Specification are true. Do you have any questions about these constitutional rights?
>
> ACC: No, sir.
>
> MJ: Do you, in fact, give up each of these constitutional rights?
>
> ACC: Yes, Sir.

R. 11.

With regard to the military judge's first error, he had an obligation under *Bertelson* to "ascertain from the [appellant] that a factual basis exists for the stipulation," *supra* at 317. *See also United States v. Watruba,* 35 M.J. 488 (C.M.A. 1992). The reason is simple. The same underlying considerations which led the Court of Military Appeals to adopt the *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1967) inquiry led the court to mandate a similar inquiry in confessional stipulation cases—to prevent the prosecution from circumventing the letter or spirit of Article 45(a), UCMJ, which prohibits improvident pleas of guilty. *Bertelson, supra* at 316. *See also Watruba,* 35 M.J. at 490 n. 2 (Discussing how it "should come as no shock that the confessional-stipulation inquiry required under *Bertelson* that is founded on Article 45(a) should differ from the stipulation inquiry conducted in [United States] District Court.")

In fact, the inquiry at bar is practically the exact replica of the defective inquiry in *United States v. Terry,* 45 C.M.R. 216 (C.M.A. 1972), a case which the Court of Military Appeals cited in *Bertelson,* 3 M.J. at 317, as standing for the proposition that the trial judge must "also **ascertain for the accused on the record that a factual basis exists for the stipulation**" in confessional stipulation cases. In *Terry,* the Court reversed a guilty plea case for insufficient inquiry when all the judge did was recite the charged specifications:

> Before accepting the appellant's pleas in his case the military judge read aloud each specification in its entirety. The judge then recited the elements constituting the offenses. Terry assured the judge that he understood the meaning of the specifications and the elements. The responses satisfied the judge that no further development of the facts was needed to iden-

> tify the plea with the offenses charged. He accepted the proffered guilty plea.

*Terry*, 45 C.M.R. at 216. Finding this factual inquiry insufficient, the Court commented:

> The record reveals nothing more than a recital of the elements of the offenses charged, followed by Terry's affirmative reply to the military judge's conclusion, You are in fact pleading guilty because you are in fact guilty?" Colloquies of this nature have never satisfied the demands of *Care,* for they fail to furnish a satisfactory factual development.

*Id.* at 217.

Like the military judge in *Terry,* the military judge *sub judice* failed to ascertain **any underlying facts** to the confessional stipulation found in Pros. Ex. 1. He thereby committed reversible error. *United States v. Honeycutt,* 29 M.J. 416, 419 n.5 (C.M.A. 1990). Because there was essentially no "factual" stipulation before the judge related to the charge, detailed or otherwise, no detailed stipulated testimony by a witness setting out the appellant's offenses, nor any confession before the military judge, there can be assertion by appellee that the totality of circumstances surrounding this case vitiates the prejudice suffered by the appellee by this improper and defective inquiry. This is especially true in light of the appellant's duress defense, discussed *supra,* a defense that a confessional stipulation, as a matter of law, does not waive. *Cf., Id.; See Watruba,* 35 M.J. at 491 (C.M.A. 1992).

With regard to the military judges' second error, that of misadvising the appellant of the effect of his confessional stipulation, the Court of Military Appeals recently noted that:

> In many respects, as the military judge observed, this predicate to accepting a confessional stipulation of

> fact parallels the inquiry into the providence of a guilty plea. Still significant legal differences exist between, on the one hand, pleading not guilty but agreeing to a confessional stipulation and, on the other, pleading guilty. For instance, in the former case, the accused does not automatically waive all of the constitutional rights that are waived as a matter of law by a plea of guilty; clearly, for example, his plea of not guilty still as a matter of law requires a trial of facts by the court. Thus, the military judge's advice here regarding Watruba's waiver of his constitutional rights was incorrect.

*Watruba,* 35 M.J. at 490-91. A comparison between the *Bertelson* confessional stipulation misadvice in *Watruba* and the advice provided to the appellant at bar leads to just one conclusion, that the military judge's advice to the appellant was incorrect as a matter of law—as the Court stressed, a "plea of not guilty still as a matter of law requires a trial of the facts by the court." *Watruba,* 35 M.J. at 491. Parenthetically, the military judge's consistent references to the alleged "facts" set forth in Prosecution Exhibit 1 is puzzling—there are no detailed facts therein, merely just a reiteration of the Charge Sheet specification.

In sum, the military judge committed prejudicial, reversible error during his legally defective *Bertelson* inquiry. The military judge both failed to "ascertain from the accused on the record that a factual basis exists for the stipulation," *Watruba,* 35 M.J. at 491 (Emphasis added); *Terry,* 45 C.M.R. at 217, as well as gave incorrect and misleading advice to the appellant as to the affect of the stipulation on his constitutional rights. *Watruba,* 35 M.J. at 491.

## II. THE APPELLANT WAS THE VICTIM OF SELECTIVE PROSECUTION THEREBY RENDERING HIS COURT-MARTIAL A NULLITY

The appellant's court-martial should have never been convened. But for selective and vindictive prosecution, the appellant's "offense" would not have been sent to a court-martial and this case would have been disposed of in an alternative nonjudicial forum. A review of the pertinent facts at bar serves to illustrate this point.

The appellant was a first-term airman in the latter part of 1990, and was scheduled to separate with an honorable discharge on 15 December 1990. Due, however, to the Stop-Loss Extension Program, he was prevented from doing so. Request for Discharge in Lieu of Trial by Court-Martial dated 1 April 1991, Allied Papers (hereinafter Request for Discharge); Def. Ex. A.; Affidavit of Amn Mark Zabkar dated 23 September 1991 submitted under separate motion to the lower court (hereinafter Affidavit.) Appendix B. In addition, the appellant was promoted to Sergeant on 1 December 1990. Request for Discharge; Affidavit. The appellant had not asked for NCO status, it was given to him due to his time-in-grade created by his involuntary extension, and it could not be declined. Request for Clemency dated 12 June 1991, Allied Papers, (hereinafter Clemency Request).

Over the New Year holiday, on 1 January, 1991, several anti-nuclear war civilians gained access to a heavily guarded area at Griffiss AFB, resulting in the reprimand of the entire squadron and the court-martial of six security personnel. Affidavit, Clemency Request, Allied Papers.

Less then two months after his involuntary promotion, the appellant unfortunately crossed paths with Amn Kathleen M. Malloy, more fully described *supra,* which

ultimately led to his positive urinalysis. As a result of this positive urinalysis, the appellant was scheduled to be discharged pursuant to AFR 39-10. However, the appellant's First Sergeant, SMSgt Capocia, was deployed to the Middle East, and Major Ronald J. Juhl assumed command of the appellant's squadron. Following the 22 February 1991 congressional inquiry from Congressman Horton, Ltr to the Vice Commander at Griffiss AFB, Major Juhl canceled the appellant's planned administrative separation, which should have been facilitated by the removal of his 81150 security police specialty code, and preferred the Charge and Specification at bar against the appellant on 27 March 1991. R. 6a. The Charges were referred the same day. R. 6b. This action against the appellant was done despite the fact that first term airmen under similar circumstances would have received nonjudicial punishment and a General Discharge. The appellant's Request for Discharge in Lieu of Court-Martial was disapproved by the 416th BW/CC, Col Michael F. Loughran on 23 April 1991. Ltr from Col Loughran dated 23 April 91.

As the facts *supra* indicate, the appellant was impermissibly targeted for prosecution for exercising his First Amendment right to petition the Government for redress of grievances, and for the impermissible reason of retribution for the breach of security on 1 January 1991. U.S. Const. amend. I. While other similarly situated as the appellant have been merely separated from the service with honorable characterizations of service, the appellant was forced to trial for the sole purpose of punishing him for raising valid questions regarding the irregularities in his case. *See United States v. Garwood,* 20 M.J. 148, 154 (C.M.A. 1985) (Selective prosecution established by showing others generally situated have not been proceeded against for conduct forming the basis of the charge against the appellant and that the selection to prosecute is based

upon impermissible considerations such as the desire to prevent the exercise of constitutional rights). Moreover, although the appellant was a Sergeant, he had involuntarily held that rank for less than two months and was not involved with leading a group of subordinates in a crime spree, the factual underpinnings in *United States v. Bradley,* 30 M.J. 308, 311 (C.M.A. 1990), wherein the Court of Military Appeals held that an accused's higher rank defeated a selective prosecution claim. Likewise, there was no other similarly situated accused testifying under a grant of immunity in this case. *Id.*

In sum, there is simply no "rational and legitimate prosecutorial policy" which would justify the appellant's prosecution under the facts and circumstances of this case. *Id.* Instead, the record clearly establishes that the appellant was prosecuted in retribution for exercising his constitutional rights and for the commander's illegitimate purpose of atoning for a breach of security that was not appellant's fault. This being the case, the burden shifts to the prosecution to disprove the misconduct at bar. *United States v. Hagen,* 25 M.J. 78, 84 (C.M.A. 1987). Under the facts of this case, the prosecution cannot disprove the selective prosecution allegation.[1]

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[1] Despite the aforementioned sequence of events, the Air Force Court of Military Review found that the appellant "has not presented a *prima facie* case his commanders engaged in any vindictive or discriminatory activity by electing to substitute a special court-martial for the pending administrative action. Therefore, he fails in his effort to convince us he was the victim of selective prosecution." *Zabkar,* ACM S28521 at 2. The Court of Military Appeals did not grant review of this issue or address this issue in its order. (Appendix A).

## III. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The appellant's trial defense counsel were ineffective in their defense of the appellant at trial, thereby meriting reversal of the findings and sentence. As noted *supra* in the Statement of the Case, the appellant was in the unenviable and untenable position of not only having to succumb to Amn Malloy's entreaty to smoke her "cigarette" or face her threat to cry rape, he also had to contend with the possibility that she would hurt herself if he did not do as she requested. Affidavit. On its face, this information raised the defense of duress, as the appellant "had a reasonably grounded fear" that unless he smoked the cigarette, she would immediately kill herself, suffer serious bodily injury, or scream rape (a lie, yet as an allegation which could cause appellant to face court-martial for a crime punishable by up to life in prison). *United States v. DeHart,* 33 M.J. 58, 61 (C.M.A. 1991) *citing United States v. Palus,* 13 M.J. 179 (C.M.A. 1982); *see also* R.C.M. 916(h), Manual for Courts-Martial, 1984. Despite having been made aware of the events of the evening, the appellant's trial defense attorneys, Capt Jeffery Robb and Capt John Russell advised the appellant that "a military judge will never believe the story," and that the appellant was "better advised to plead guilty or admit certain elements of the charge and request a lenient sentence." Affidavit. They therefore did not raise a necessity defense on the appellant's behalf. Moreover, despite the appellant's willingness to take a polygraph, and the fact that arrangements had been made to take a polygraph off base, Capt Robb further advised the appellant not to take the test because a "new judge," had been assigned to the case. The appellant accordingly never took one, despite repeatedly requesting one. Affidavit. Finally, although defense

counsel requested and received authority to fund an expert witness regarding suppression of the appellant's urinalysis test, and consulted with the expert, no evidence regarding problems with the urinalysis was offered at trial. Affidavit.[2]

These aforementioned actions of trial defense counsel deprived the appellant of effective assistance of counsel. *See United States v. Scott,* 24 M.J. 186, 187 (C.M.A. 1987) incorporating the standard for measuring claims of ineffectiveness of counsel found in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, but for the trial defense counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694. Trial defense counsels' conclusion that the judge would not believe what the appellant would tell him about what happened that night, and their failure to follow through and investigate what the appellant told them about that night by not personally interviewing Amn Malloy was ". . . conclusory, self-serving and inadequate to justify [their] failure to do everything legally and ethically required . . ." to prepare the appellant's case. *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). Indeed, after oral argument before the Air Force Court of Military Review below, the lower court ordered the government to obtain affidavits from both Major Jeffrey L. Robb and Captain John G. Russell, the appellant's former defense counsel. In their affidavits, both counsel admit it was their opinion that the above scenario did not constitute a duress defense, and that they did not interview Amn Malloy. According to the appel-

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[2] Defense counsels' lackadaisical attitude with respect to the appellants' defense is highlighted by the jokes on the eve of the trial that the trial better not take longer than one day, as Capt Robb was due to leave Griffiss AFB on 17 March 1991. Affidavit.

lants' former defense counsel, they were not able to interview Amn Malloy because she invoked her Article 31 rights and requested counsel. It is obvious from the tenor of both defense counsel affidavits that they were the ones who failed to put on a defense the appellant sincerely wanted, ignoring his request for a polygraph as well as foregoing a guilty plea to ensure that the circumstances surrounding the appellant's offense remained buried. They also failed to seek a grant of immunity for Amn Malloy so they could secure the evidence by which to corroborate the appellant's account of what occurred.

In this regard, for example, the affidavit of Major Robb is contradictory. On the one hand, he indicates that he executed a trial strategy to minimize the duration of confinement, yet goes on to indicate that it was he who recommended that the motion to dismiss (suppress?) be withdrawn, that the forum be judge alone, and the plea be not guilty, but accompanied by a confessional stipulation. Para. 3 of Major Robb's affidavit. Indeed, in paragraph 14 of Major Robb's affidavit, Major Robb states, "thus our plan was formulated. It was executed as expected with the results I anticipated." The appellant's rebuttal affidavit submitted to the lower court sums up the course of action the appellant desired to pursue. "My plan would have been to plead not guilty, present all of the bizarre facts, including the attempted and threatened suicide by Airman Malloy, bizarre sexual requests, threat of crying rape by Airman Malloy and all other incidents brought to bear upon myself on the night of the arrest." Appellant's Affidavit dated 23 Feb 1993. Appendix E.

The fact that the appellant failed to plead guilty should raise a red flag before this Honorable Court. It shows that at least in the appellant's mind, his actions that night were legally justified. The military judge should have asked some questions regarding the factual underpinning of the

appellant's confessional stipulation during the *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) inquiry in this case. *See* discussion under assignment of Error I. If he had, the military judge would have unearthed the defense the appellant's trial defense counsel tried to bury. The actions of trial defense counsel in and of themselves, however, amounted to ineffectiveness of counsel.[3]

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[3] The Air Force Court of Military Review opined that the trial defense counsels' performance was not deficient, and did not pursue an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court of Military Appeals did not grant on the issue of ineffective assistance of counsel, nor did they comment on this issue in their order affirming the appellant's conviction. (Appendix A).

## CONCLUSION

The questions presented above are genuinely important and affect not only petitioner, but the rights of millions of Americans serving in the armed forces. In this case, it is clear that the appellant was singled out for prosecution for exercising his constitutional right to seek redress, that he was hamstrung at trial by ineffective assistance of counsel, and ultimately prejudiced by the military judge's failure to perform the inquiry required by *United States v. Bertelson*. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 1994

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF MILITARY APPEALS

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USCMA Dkt. No. 93-0698/AF
CMR Dkt. No. S28521

UNITED STATES, APPELLEE

*v.*

MARK S. ZABKAR (082-54-5493), APPELLANT

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**ORDER**

On further consideration of the granted issue (38 MJ 233), we are satisfied that the military judge substantially complied with *United States v. Bertelson,* 3 MJ 314 (CMA 1977), when he advised appellant of the effect of the stipulation of fact in this case. Accordingly, it is, by the Court, this 20th day of July, 1994

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JIVIDEN)
Appellate Government Counsel (MADSEN)

**APPENDIX B**

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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ACM S28521

UNITED STATES

*v.*

SERGEANT MARK S. ZABKAR, FR082-54-5493
UNITED STATES AIR FORCE

---

1 March 1993

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Sentence adjudged 15 May 1991 by SPCM convened at Griffiss Air Force Base, New York. Military Judge: Perry L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain David D. Jividen (argued), Colonel Jeffrey R. Owens, Lieutenant Colonel Terry J. Woodhouse, Major Alice M. Kottmyer, and Mr. Mark S. Nunn, Esquire.

Appellate Counsel for the United States: Captain Carlos L. McDade (argued), Colonel Richard L. Purdon, Lieutenant Colonel Brenda J. Hollis, Lieutenant Colonel Jeffery T. Infelise, and Major Paul H. Blackwell, Jr.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

**OPINION OF THE COURT**

O'HAIR, Senior Judge:

At his special court-martial for a single use of marijuana in violation of Article 112a, UCMJ, appellant had very little to say. There were no motions, he pleaded not guilty to the charge, entered a confessional stipulation, and made no argument to the military judge on findings. During the sentencing portion of the trial appellant commented in a short oral statement that, "I was presented with the opportunity to use marijuana. I did so having a free choice." His written statement to the trial court highlighted his family background and his embarrassment and remorse for having used marijuana. Presumably in deference to appellant's stated desire for a punitive discharge rather than confinement, the military judge sentenced him to a bad-conduct discharge, confinement for 15 days, and reduction to E-1.

I

In the post-trial submissions to the convening authority appellant raised, for the first time, an allegation he was the victim of selective prosecution. He based this on several theories: 1) he was being penalized for having previously complained in a letter to his congressman because the Air Force had placed on hold on the processing of his administrative discharge; 2) a replacement unit commander decided to scrap the pending administrative discharge action and prefer court-martial charges because appellant recently attained the grade of sergeant; and 3) all other airmen had been administratively discharged, not court-martialed, for a single incidence of use of marijuana.

The law requires appellant to articulate a *prima facie* case that he was singled out for prosecution which is based on bad faith. *United States v. Hagen,* 25 M.J. 78 (C.M.A.

1987). Appellant has not presented a *prima facie* case his commanders engaged in any vindictive or discriminatory activity by electing to substitute a special court-martial for the pending administrative discharge action. Therefore, he fails in his effort to convince us he was the victim of selective prosecution.

The government would have us believe the above analysis was unnecessary because appellant's failure to raise this claim at trial waived the issue. They rely on language in *Hagen* which states, "Ordinarily, the forum for vindicating oneself in a criminal justice system is the trial." *Hagen,* 25 M.J. at 84. Similarly, in *United States v. Bradley,* 30 M.J. 308, 310-311 (C.M.A. 1990), the court noted, "a finding of waiver based on appellant's failure to properly raise this claim might be appropriate." To take such a step and find the issue was waived would place the military courts in agreement with our civilian brethren who, as held in *United States v. Mann,* 884 F.2d 532, 539-40 (10th Cir. 1989), require that objections based on defects in the initiation of prosecution must be raised before trial. In the absence of clear authority to find this issue can be waived, we have made the finding, *supra,* that no unlawful command influence exists.

II

Appellant next asserts he was denied effective assistance of trial defense counsel because his counsel failed to raise the issue of duress, did not pursue a pretrial polygraph of appellant, and did not attempt to suppress the results of the urinalysis test. Since the government did not obtain an affidavit from either defense counsel, we ordered the government to obtain affidavits which would address the issues raised by appellant. Both affidavits were received and filed with the Court, as well as one submitted in re-

buttal by appellant. From our reading of all three affidavits, we conclude the strategy the counsel pursued, both before and during the trial, was sensible, fully explained to appellant, and agreed to, by him, before it was executed. In our opinion, the trial defense counsels' performance was not deficient, thus eliminating the need for further analysis under *Strickland v. Washington,* 466 U.S. 668 (1984).

III

The only evidence presented by the government at trial to prove its case was a bare bones stipulation of fact. The first of three paragraphs contains exclusively jurisdictional information. Paragraphs 2 and 3 read as follow:

> 2. Between on or about 20 December 1990 and on or about 20 January 1991, at or near Griffiss Air Force Base, New York, the accused, Sgt Zabkar, knowingly and without legal justification wrongfully used marijuana, a controlled substance.
>
> 3. The accused's urine specimen, taken on 20 January 1991, tested positive for marijuana at the Air Force Drug Test Laboratory, Brooks AFB, Texas. From the time of collection through the time of testing, a proper chain of custody was maintained. The concentration of Tetrahydrocannabinol (THC) was 33 nanograms/ml.

The military judge correctly perceived this as a confessional stipulation which obligated him to conduct a *Bertelson** inquiry because the stipulation amounted to a total confession of guilt. Accordingly, the military judge informed appellant he could not accept this stipulation into

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* *United States v. Bertelson,* 3 M.J. 314 (C.M.A. 1977).

evidence until appellant understood certain legal consequences. Included among these was an acknowledgement that: 1) he had to consent to its admission; 2) the military judge could find him guilty based solely on the stipulation; and 3) he would be giving up his constitutional right against self-incrimination, a right to the trial of the facts, and the right to be confronted by witnesses against him. Next, the judge explained the elements of the offense and the maximum imposable sentence. Appellant had no questions during this explanation of his rights and responded there was no pretrial agreement among the parties. After the judge read the stipulation of fact into the record, the counsel for both sides confirmed the facts contained in the stipulation were true and admissible. The judge then asked appellant if the facts were true to the best of his knowledge and appellant answered in the affirmative.

The need for a *Bertelson* inquiry arose because of the Court of Military Appeal's concern that Bertelson had not "knowingly, intelligently and voluntarily consented" to the admission of a stipulation of fact which practically amounted to a confession. As a result, the court mandated that in the future, all military judges should conduct an inquiry for each confessional stipulation to assure the accused "knowingly, intelligently and voluntarily consented" to the admission of the stipulation, as well as to "ascertain on the record that a factual basis exists for the stipulation." *Bertelson,* 3 M.J. at 317. There is no further discussion as to what would constitute a "factual basis", only a citation to *United States v. Terry,* 21 U.S.C.M.A. 442, 45 C.M.R. 216 (1972).

In *Terry* the military judge conducted what amounted to an inadequate guilty plea providence inquiry because all he did was to read aloud each specification, recite the elements, and obtain an assurance from Terry he understood the meaning of the specifications and the elements. The

court found this exchange failed to furnish a satisfactory factual development of the misconduct. There was no assurance that the misconduct for which Terry pleaded guilty was the same misconduct with which he was charged. *Terry,* 45 C.M.R. at 217.

In the case before us, appellant asserts the military judge failed to inquire whether a factual basis existed for admission of this confessional stipulation. Appellant would have us require the same intensive dialogue between the military judge and the accused as is mandated by *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969). We disagree.

It must not be forgotten that an accused undergoing a *Bertelson* inquiry has pleaded not guilty. He is not placed under oath and he has waived his Article 31 rights only with regard to the matters contained in the stipulation. *See United States v. Watruba,* 35 M.J. 488 (C.M.A. 1992); *United States v. Enlow,* 26 M.J. 940 (A.C.M.R. 1988). To determine if a factual basis exists for the stipulation, the military judge's inquiry is fairly limited to going over the stipulation with the accused, line by line, and ascertaining if the facts are true. Such a procedure was utilized and found to be perfectly acceptable in *United States v. Matlock,* 35 M.J. 895 (A.C.M.R. 1992). If this procedure is followed, absent a later contradiction of the information in the stipulation, which brings into question whether it had a factual basis or was true, the stipulation is admissible. *See United States v. Cantu,* 30 M.J. 1088 (N.M.C.M.R. 1989).

In this case the military judge provided all the appropriate advice to appellant as to the uses to be made of his stipulation, the rights he was waiving and that the facts in the stipulation were true. There were no other challenges to the truthfulness of this stipulation during the remainder of the trial. Accordingly, the admission of the stipulation was proper.

IV

The remaining assignments of error are without merit. *See United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982); *United States v. Graff,* 35 M.J. 450 (C.M.A. 1992).

The findings of guilty and the sentence are

AFFIRMED.

Judges SNYDER and GRUNICK concur.

OFFICIAL

NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR